

Instructions For Sex Discrimination Claims Under the Equal Pay Act

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Introductory Note to Equal Pay Act Instructions

These Equal Pay Act instructions vary from the pattern established in the previous employment discrimination instructions. This different structure is due to the following circumstances:

1) An Equal Pay Act plaintiff is not required to prove an intent to discriminate, so there is no basis for a mixed-motive or pretext instruction.

2) There is no cause of action for hostile work environment under the Equal Pay Act, because the Act only grants recovery of equal pay for equal work.

3) There is no separate cause of action for disparate treatment under the Equal Pay Act, because the basic cause of action under the Act is one for disparate treatment in pay.

4) There is no need for separate instructions for definitions, because there is only one basic instruction for an Equal Pay Act claim, and the pertinent definitions are included within it.

5) The damages available in a basic Equal Pay Act claim differ from those available under the other employment discrimination statutes, and more importantly differ from the damages available in a retaliation action. Thus, the damage instructions need to be bifurcated into basic Equal Pay Act claims and retaliation claims.

11.0 Equal Pay Act Introductory Instruction

Model

In this case the Plaintiff _____ has made a claim under the Equal Pay Act, a statute that prohibits an employer from paying women less than men for jobs that require substantially equal work.

Specifically, [plaintiff] claims that she was paid less than (a) male employee(s) even though she performed substantially equal work.

[Defendant] claims that [plaintiff's] job was not substantially equal to the jobs performed by the male employee(s). Further, [defendant] asserts that [describe any affirmative defenses].

I will now instruct you more fully on the issues you must address in this case.

Comment

Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

The central provision of the Equal Pay Act is 29 U.S.C. §206(d)(1), which provides as follows:

(d) Prohibition of sex discrimination.

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

The Supreme Court in *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974), described the intent of the Equal Pay Act:

1 Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be
2 a serious and endemic problem of employment discrimination in private industry--the fact
3 that the wage structure of many segments of American industry has been based on an ancient
4 but outmoded belief that a man, because of his role in society, should be paid more than a
5 woman even though his duties are the same. The solution adopted was quite simple in
6 principle: to require that "equal work will be rewarded by equal wages."

7 The Equal Pay Act was created to prohibit wage discrimination against women. But the
8 language of the statute is broad enough to permit recovery by a male alleging sex-based wage
9 discrimination. *See, e.g., Board of Regents v. Daves*, 522 F.2d 380 (8th Cir. 1975) (paying women
10 more than men for substantially equal work violates the Equal Pay Act). These instructions are
11 written using the feminine for the plaintiff, as the case law indicates that virtually all of the plaintiffs
12 are women, but it can of course be modified if the plaintiff is male.

13 *Relationship to Title VII*

14 A claim for sex-based wage discrimination can potentially be brought under either the Equal
15 Pay Act, or Title VII, or both. There are some similarities, and some important differences, between
16 a claim under the Equal Pay Act and a Title VII action for sex-based wage discrimination.

17 The most important similarity between the two actions is that the affirmative defenses set
18 forth in the Equal Pay Act — (i) a seniority system; (ii) a merit system; (iii) a system which measures
19 earnings by quantity or quality of production; and (iv) a differential based on any other factor other
20 than sex — are applicable to Title VII actions for sex-based wage discrimination. This was made
21 clear by the Bennett Amendment to Title VII. See the discussion in *County of Washington v.*
22 *Gunther*, 426 U.S. 161 (1981).

23 The most important differences between the two actions are:

24 1. The Equal Pay Act does not require proof of intent to discriminate. *EEOC v. Delaware*
25 *Dept. of Health and Social Services*, 865 F.2d 1408 (3d Cir. 1989). The plaintiff recovers under the
26 Equal Pay Act by proving that she received lower pay for substantially equal work. In contrast, Title
27 VII disparate treatment claims require proof of an intent to discriminate. See Lewis and Norman,
28 *Employment Discrimination Law and Practice* § 7.15 (2d ed. 2001). On the other hand, Title VII
29 does not require the plaintiff to prove the Equal Pay Act statutory requirements of "equal work" and
30 "similar working conditions." In *Gunther, supra*, the Supreme Court explained the importance of
31 retaining Title VII recovery as an alternative to recovery under the Equal Pay Act. The *Gunther*
32 Court recognized that under the Bennett Amendment to Title VII, a claim for sex-based wage
33 discrimination is subject to the affirmative defenses of the Equal Pay Act. But the Court held that
34 a Title VII action is not similarly subject to the statutory requirements of showing "equal work,"
35 "similar working conditions," etc. The Court found it important to retain the possibility of recovery
36 for intentional sex-based wage discrimination under Title VII:

37 Under petitioners' reading of the Bennett Amendment, only those sex-based wage

1 discrimination claims that satisfy the "equal work" standard of the Equal Pay Act could be
2 brought under Title VII. In practical terms, this means that a woman who is discriminatorily
3 underpaid could obtain no relief -- no matter how egregious the discrimination might be --
4 unless her employer also employed a man in an equal job in the same establishment, at a
5 higher rate of pay. Thus, if an employer hired a woman for a unique position in the
6 company and then admitted that her salary would have been higher had she been male, the
7 woman would be unable to obtain legal redress under petitioners' interpretation. Similarly,
8 if an employer used a transparently sex-biased system for wage determination, women
9 holding jobs not equal to those held by men would be denied the right to prove that the
10 system is a pretext for discrimination. Moreover . . . if the employer required its female
11 workers to pay more into its pension program than male workers were required to pay, the
12 only women who could bring a Title VII action under petitioners' interpretation would be
13 those who could establish that a man performed equal work: a female auditor thus might
14 have a cause of action while a female secretary might not. Congress surely did not intend
15 the Bennett Amendment to insulate such blatantly discriminatory practices from judicial
16 redress under Title VII.

17 452 U.S. at 178-79.

18 2. Title VII's burden-shifting schemes (see Instructions 5.1.1, 5.1.2) differ from the burdens
19 of proof applicable to an action under the Equal Pay Act. The difference was explained by the Third
20 Circuit in *Stanziale v. Jargowsky*, 200 F.3d 101, 107-108 (3d Cir. 2000), a case in which the plaintiff
21 brought claims under Title VII, the ADEA, and the Equal Pay Act:

22 Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29
23 U.S.C. § 206 et seq., do not follow the three-step burden-shifting framework of *McDonnell*
24 *Douglas*; rather, they follow a two-step burden-shifting paradigm. The plaintiff must first
25 establish a prima facie case by demonstrating that employees of the opposite sex were paid
26 differently for performing "equal work"--work of substantially equal skill, effort and
27 responsibility, under similar working conditions. *E.E.O.C. v. Delaware Dept. of Health and*
28 *Social Services*, 865 F.2d 1408, 1413-14 (3d Cir. 1989). The burden of persuasion then
29 shifts to the employer to demonstrate the applicability of one of the four affirmative defenses
30 specified in the Act. Thus, the employer's burden in an Equal Pay Act claim -- being one of
31 ultimate persuasion -- differs significantly from its burden in an ADEA [or Title VII] claim.
32 Because the employer bears the burden of proof at trial, in order to prevail at the summary
33 judgment stage, the employer must prove at least one affirmative defense "so clearly that no
34 rational jury could find to the contrary." *Delaware Dept. of Health*, 865 F.2d at 1414.

35 The employer's burden is significantly different in defending an Equal Pay Act claim
36 for an additional reason. The Equal Pay Act prohibits differential pay for men and women
37 when performing equal work "*except where such payment is made pursuant to*" one of the
38 four affirmative defenses. 29 U.S.C. § 206(d)(1) (emphasis added). We read the highlighted
39 language of the statute as requiring that the employer submit evidence from which a
40 reasonable factfinder could conclude not merely that the employer's proffered reasons could

1 explain the wage disparity, but that the proffered reasons do in fact explain the wage
2 disparity. See also *Delaware Dept. of Health*, 865 F.2d at 1415 (stating that "the correct
3 inquiry was . . . whether, viewing the evidence most favorably to the [plaintiff], a jury could
4 only conclude that the pay discrepancy resulted from" one of the affirmative defenses
5 (emphasis added)). Thus, unlike an ADEA or Title VII claim, where an employer need not
6 prove that the proffered legitimate nondiscriminatory reasons actually motivated the salary
7 decision, in an Equal Pay Act claim, an employer must submit evidence from which a
8 reasonable factfinder could conclude that the proffered reasons actually motivated the wage
9 disparity.

10 3. The Equal Pay Act exempts certain specific industries from its coverage, including some
11 fishing and agricultural businesses. See 29 U.S.C. § 213. These industries are not, however, exempt
12 from Title VII.

13 4. In contrast to Title VII, the Equal Pay Act has no coverage threshold defined in terms of
14 the employer's number of employees.

15 5. The Equal Pay Act carries a longer limitations period for back pay than does Title VII. As
16 stated in Lewis and Norman, *Employment Discrimination Law and Practice* § 7.20 (2d ed. 2001):

17 An EPA action is governed by the FLSA [Fair Labor Standards Act] statute of
18 limitations. The FLSA provides a two year statute of limitations for filing, three years in the
19 case of a "willful" violation. These statutes of limitation compare favorably from the
20 plaintiff's perspective with the 180-day or 300-day administrative filing deadlines of Title
21 VII.

22 Under Title VII, the statute of limitations for a pay claim begins to run upon the occurrence
23 of an "unlawful employment practice," which, pursuant to the 2009 amendments to 42 U.S.C. §
24 2000e-5(e), can include "when a discriminatory compensation decision or other practice is adopted,
25 when an individual becomes subject to a discriminatory compensation decision or other practice, or
26 when an individual is affected by application of a discriminatory compensation decision or other
27 practice, including each time wages, benefits, or other compensation is paid, resulting in whole or
28 in part from such a decision or other practice." *Id.* § 2000e-5(e)(3)(A).¹ This amendment brings the
29 accrual date for a Title VII claim more in line with the EPA mechanism, in which an EPA claim
30 arises each time the employee receives lower pay than male employees doing substantially similar
31 work.

32 6. "The Equal Pay Act, unlike Title VII, has no requirement of filing administrative
33 complaints and awaiting administrative conciliation efforts." *County of Washington v. Gunther*, 452
34 U.S. 161, 175, n.14 (1981).

¹ See *Noel v. Boeing Co.*, 2010 WL 3817090, at *6 (3d Cir. 2010) (holding that Section 2000e-5(e)(3)(A) "does not apply to failure-to-promote claims").

1 Where the plaintiff claims that wage discrimination is a violation of both Title VII and the
2 Equal Pay Act, it will be necessary to give two sets of instructions, with the proviso that the
3 affirmative defenses provided by the Equal Pay Act (see Instructions 11.2.1-11.2.4) will be
4 applicable to both claims.

11.1.1 Basic Elements of an Equal Pay Act Claim

Model

For [plaintiff] to prevail on her claim against [defendant] for violation of the Equal Pay Act, [plaintiff] must prove all of the following elements by a preponderance of the evidence:

First: [Defendant] has employed [plaintiff] and (a) male employee(s) in jobs requiring substantially equal skill, effort and responsibility;

Second: the two jobs are performed under similar working conditions; and

Third: [Plaintiff] was paid a lower wage than the male employee(s) doing substantially equal work.

I will now give you further instructions on these three elements. When evaluating whether [plaintiff] has established these three elements, you must keep in mind that [plaintiff] does not have to prove that [defendant] meant to discriminate against [plaintiff] because she was female. In other words, [plaintiff] does not have to prove intent to discriminate.

In determining whether [plaintiff's] job required substantially equal skill, effort, and responsibility as that of the male employee(s), you must compare the jobs and not the individual employees holding those jobs. It is not necessary that the two jobs be identical; the Equal Pay Act requires proof that the performance of the two jobs demands "substantially equal" skill, effort and responsibility. Insignificant, insubstantial, or trivial differences do not matter and may be disregarded. Job classifications, descriptions, or titles are not controlling. It is the actual work or performance requirements of the two jobs that is important.

In evaluating whether the performance requirements of the two jobs are substantially equal, you must consider the "skill," "effort" and "responsibility" required for these jobs. I will now tell you what is meant by these terms, "skill," "effort" and "responsibility."

Skill:

In deciding whether the jobs require substantially equal "skill" you should consider such factors as the level of education, experience, training and ability necessary to meet the performance requirements of the respective jobs. Jobs may require "equal skill" even if one job does not require workers to use these skills as often as another job. Remember also that you are to compare the jobs, not the employees. So the fact that a male employee has a qualification that [plaintiff] does not is relevant only if the particular qualification is necessary or useful for performing the job.

Effort:

In deciding whether the jobs require substantially equal "effort" you should consider the mental, physical and emotional requirements for performing the job. Duties that result in mental or

1 physical fatigue or emotional stress, as well as factors that alleviate fatigue and stress, should be
2 weighed together in assessing the relative effort involved. “Equal effort” does not require people to
3 use effort in exactly the same way. If there is no substantial difference in the amount or degree of
4 effort to do the jobs, they require “equal effort.” However, if the job of the male employee(s)
5 require(s) additional tasks that consume a significant amount of extra time and effort that would not
6 be expected of [plaintiff], then the jobs do not require substantially equal effort.

7 *Responsibility:*

8 In deciding whether the jobs involve substantially equal “responsibility,” you should
9 consider the degree of accountability expected by the employer for a person filling the jobs, as well
10 as the amount of preparation required to perform the job duties. You should also take into account
11 such things as the level of authority delegated to [plaintiff] as compared to the male employee(s),
12 including whether [plaintiff] and the male employee(s) were equally expected to direct the work of
13 others, or to represent [defendant] in dealing with customers or suppliers. Finally, you should
14 consider the consequences to the employer of effective performance in the respective jobs.

15 You should note that “skill,” “effort” and “responsibility” constitute separate tests, each of
16 which must be met in order for the equal pay requirement to apply.

17 *Similar Working Conditions:*

18 With respect to the second element of [plaintiff’s] claim, you must find that the jobs are
19 performed under similar working conditions. The conditions need only be similar; they need not be
20 identical. In deciding whether the working conditions of the two jobs are similar, you should
21 consider the surroundings or the environment in which the work is performed — including any
22 hazards or risks, travel, and weather — to which the respective employees may be exposed. [I
23 instruct you, however, that time of day is not relevant to determining whether working conditions
24 are similar. For example, it is not relevant that some employees work the day shift and some the
25 night shift.]

26 *Wage Comparison:*

27 With respect to the third element of [plaintiff’s] claim, [plaintiff] must prove that she was
28 paid a lower wage than (a) male employee(s) doing substantially equal work. In determining the
29 respective levels of pay, you are to consider all forms of compensation, whether called wages,
30 salary, profit sharing, expense account, use of company car, gasoline allowance, or some other
31 name. Fringe benefits are also included in the comparison of wages under the Equal Pay Act, as are
32 vacation and holiday pay and overtime pay.

34 **Comment**

35 To establish a violation of the Equal Pay Act, a plaintiff must prove that the defendant paid

1 her lower wages than were paid to a man or men for “equal work on jobs the performance of which
2 requires equal skill, effort and responsibility, and which are performed under similar working
3 conditions.” *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). The Court in *Corning*
4 *Glass* stated that the element of similar working conditions “encompasses two subfactors:
5 ‘surroundings’ and ‘hazards.’” It proceeded to describe these two subfactors:

6 "Surroundings" measures the elements, such as toxic chemicals or fumes, regularly
7 encountered by a worker, their intensity, and their frequency. "Hazards" takes into account
8 the physical hazards regularly encountered, their frequency, and the severity of injury they
9 can cause.

10 The *Corning* Court held that under this definition the time of day at which employees worked could
11 not be relevant to working conditions. Thus, the fact that male employees worked the night shift and
12 females the day shift did not make the jobs unequal. *See also EEOC v. State of Delaware Dept. of*
13 *Health and Social Services*, 865 F.2d 1408, 1417 (3d Cir. 1989) (rejecting the argument that working
14 conditions are dissimilar if one employee sells products inside a store and another sells the products
15 outside the establishment).

16 In the leading case of *Brobst v. Columbus Services Intern.*, 761 F.2d 148, 151 (3d Cir. 1985),
17 the court provided a number of guidelines for determining whether the plaintiff has met the burden
18 of proving that she was doing “equal work” within the meaning of the Equal Pay Act. It noted that
19 plaintiffs must establish their case “by proving actual job content; by the same token the employer
20 may not rely merely on the job description.” Reviewing Third Circuit case law, the *Brobst* court
21 analyzed the “equal work” requirement as follows:

22 As our opinions show, the relevant issue is not the name under which the position
23 was classified but what was actually done. *See Usery v. Allegheny County Institution*
24 *District*, 544 F.2d 148 (3d Cir. 1976); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d
25 Cir.1970).

26 In *Wheaton Glass*, we explained that Congress did not intend to limit the applicability
27 of the Equal Pay Act to cases involving identical work. In *Allegheny County*, we quoted the
28 applicable regulation stating, "Congress did not intend that inconsequential differences in job
29 content would be a valid excuse for payments of a lower wage to an employee of one sex
30 than to an employee of the opposite sex if the two are performing equal work on essentially
31 the same jobs in the same establishment." *Allegheny County*, 544 F.2d at 152 (quoting 29
32 C.F.R. § 800.120 (1974)). Applying that regulation, we held that although beauticians,
33 unlike barbers, used several tools in addition to the basic scissors, clippers and combs "which
34 use requires more effort of performance", this did not support a finding of unequal work. *Id.*
35 at 152.

36 All the courts have agreed that the test is whether the work is "substantially equal".
37 When the Supreme Court reversed this court's determination that work on a night shift was

1 not equal to the same work performed on a day shift, it took a pragmatic approach to the
2 issue of equality, holding that inspection work whether performed during the day or night is
3 "equal work" within the meaning of the Act. *Corning Glass Works v. Brennan*, 417 U.S. at
4 202-03.

5 The crucial finding on the equal work issue is whether the jobs to be compared have
6 a "common core" of tasks, i.e., whether a significant portion of the two jobs is identical. The
7 inquiry then turns to whether the differing or additional tasks make the work substantially
8 different. . . . Given the fact-intensive nature of the inquiry, summary judgment will often be
9 inappropriate.

10 For other cases in the Third Circuit discussing the concept of "equal work", *see, e.g., Angelo*
11 *v. Bacharach Instrument Co.*, 555 F.2d 1164, 1172 (3d Cir. 1977) (noting that "mechanical and
12 surface similarities are inadequate to establish the equality of two positions"); *Welde v. Tetley, Inc.*,
13 864 F. Supp. 440, 442 (M.D.Pa. 1994) (noting that the term "skill" "includes an assessment of such
14 factors as experience, training and ability"; "effort" "refers to the physical or mental exertion needed
15 to perform a job"; "responsibility" "concerns the degree of accountability required in performing a
16 job, with emphasis on the importance of the job obligation"; and that the three terms — skill, effort
17 and responsibility — "constitute separate tests, each of which must be met in order for the equal pay
18 standard to apply").

19
20 For a definition of "wages," see 29 C.F.R. § 1620.10:

21 Under the EPA, the term "wages" generally includes all payments made to [or on behalf of]
22 an employee as remuneration for employment. The term includes all forms of compensation
23 irrespective of the time of payment, whether paid periodically or deferred until a later date,
24 and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus,
25 uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance,
26 or some other name. Fringe benefits are deemed to be remuneration for employment. . . .
27 [V]acation and holiday pay, and premium payments for work on Saturdays, Sundays,
28 holidays, regular days of rest or other days or hours in excess or outside of the employee's
29 regular days or hours of work are deemed remuneration for employment and therefore wage
30 payments that must be considered in applying the EPA, even though not a part of the
31 employee's "regular rate."

11.1.2 Equal Pay Act — Retaliation

Model

[Plaintiff] claims that [defendant] discriminated against her because she opposed a practice made unlawful by the Equal Pay Act.

To prevail on this claim, [plaintiff] must prove all of the following elements by a preponderance of the evidence:

First: [Plaintiff] [filed a complaint] [instituted a proceeding] [made an informal complaint to her employer²] [testified/agreed to testify in a proceeding] asserting rights under the Equal Pay Act.

Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the protected conduct took place.

Third: There was a causal connection between [describe challenged activity] and [plaintiff's] [describe plaintiff's protected activity].

Concerning the first element, [plaintiff] need not prove the merits of any Equal Pay Act claim, but only that she was acting under a good faith belief that [her] [or someone else's] rights under the Equal Pay Act were violated.

Concerning the second element, the term “materially adverse” means that [plaintiff] must show [describe alleged retaliatory activity] was serious enough that it well might have discouraged a reasonable worker from [describe plaintiff's protected activity]. [The activity need not be related to the workplace or to [plaintiff's] employment.]

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [defendant's] action followed shortly after [defendant] became aware of [plaintiff's] [describe activity]. Causation is, however, not necessarily ruled out by a more extended passage of time. Causation may or may not be proven by antagonism shown toward [plaintiff] or a change in demeanor toward [plaintiff].

Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative effect on [describe alleged retaliatory activity]. “Determinative effect” means that if not for [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

² See the Comment to this instruction for a discussion of whether complaints to a private employer are protected activity under the Equal Pay Act.

Comment

29 U.S.C. § 215(a)(3), a provision of the Fair Labor Standards Act, establishes a cause of action for retaliation against employees who assert rights under the Equal Pay Act or the FLSA. Section 215(a)(3) provides that it is unlawful “to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding . . .”

Protected Activity

The literal terms of the statute might be read to limit protected conduct to that involved in a formal proceeding.³ However, the Supreme Court in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011), held that “the statutory term ‘filed any complaint’ includes oral as well as written complaints within its scope,” *id.* at 1329. “To fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. This standard can be met, however, by oral complaints, as well as by written ones.” *Id.* at 1335.

The *Kasten* Court declined to decide whether the anti-retaliation provision encompasses complaints made to a private employer rather than to the government. *See id.* at 1336 (applying the Court’s usual practice of declining to “consider a separate legal question not raised in the certiorari briefs”). The Third Circuit has not yet decided that question either. It is worth noting that several district courts within the Circuit, as well as most of the other Courts of Appeal, have held that Section 215(a)(3) should be construed broadly. In a pre-*Kasten* case, *Dougherty v. Ciber, Inc.*, 2005 WL 2030473 (M.D. Pa. 2005), a district court provided an analysis of the statute and the case law that still seems relevant:

The United States Court of Appeals for the Third Circuit has not directly addressed the issue of whether making an informal complaint to an employer constitutes a protected activity under section 215(a)(3). Although some courts have narrowly construed the language of section 215(a)(3), many circuits give effect to the remedial nature of the FLSA by affording broad employee protection through a liberal interpretation of section 215(a)(3). See, e.g., *Valerio v. Putnam Assoc., Inc.*, 173 F.3d 35, 42-43 (1st Cir.1999) (finding that “filed any complaint” encompasses more than filings with a government agency such that filing of a complaint with an employer may give rise to a retaliation claim); *Lambert v. Ackerly*, 180 F.3d 997, 1005 (9th Cir.1999) (holding that “filed any complaint” “extends to employees who complain to their employer about an alleged violation of the Act”); *EEOC*

³ Such a reading would contrast with the retaliation provisions of other acts (such as Title VII and the ADEA) which protect any act in opposition to prohibited practices under the respective statutes, including informal complaints to an employer.

1 v. *Romeo Cmty. Sch.*, 976 F.2d 985, 989-90 (6th Cir.1992) (holding that plaintiff's oral
2 complaint to her employer was sufficient to trigger the protection of § 215(a)(3)); *Love v.*
3 *RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir.1984) (holding that § 215(a)(3) "also
4 applies to the unofficial assertion rights through complaints at work"); *EEOC v. White & Son*
5 *Enters.*, 881 F.2d 1006, 1011 (11th Cir.1975) (concluding that even though the aggrieved
6 parties did not file a formal complaint with a government agency, "the unofficial complaints
7 expressed by the women to their employer about unequal pay constitute an assertion of rights
8 protected under the [FLSA]").

9 Similarly, the United States Court of Appeals for the Third Circuit has instructed that
10 the language of the anti-retaliation provision should be construed liberally. *Brock v.*
11 *Richardson*, 812 F.2d 121, 123-24 (3d Cir.1987) (holding that the remedial provisions of the
12 Fair Labor Standards Act "must not be interpreted or applied in a narrow, grudging
13 manner"). In *Brock*, an employee was discharged because the employer mistakenly believed
14 that the employee filed a complaint with the Department of Labor. The Third Circuit
15 concluded that the discharge created the "same atmosphere of intimidation as does the
16 discharge of an employee who did in fact complain of FLSA violations." *Id.* at 125; see also
17 *Fogarty v. Boles*, 121 F.3d 886, 891 (3d Cir.1997) (holding that because the FLSA is aimed
18 at eliminating an atmosphere of intimidation, the discharge of employees under the mistaken
19 impression that they had participated in protected statutory activity is enough to establish a
20 violation of the Act). The Third Circuit noted that courts have looked to the "animating
21 spirit" of the anti-retaliation provision in "applying it to activities that might have not been
22 explicitly covered by the language" of section 215(a)(3). *Brock*, 812 F.3d at 124. Further, the
23 Court reasoned that the FLSA was designed to encourage employees to report suspected
24 violations and therefore "the key to construing the anti-retaliation provision is the need to
25 prevent employees' fear of economic retaliation for voicing grievances about substandard
26 conditions." *Id.*

27 In applying the interpretation announced in *Brock*, several district courts within the
28 Third Circuit have held that informal complaints to employers are protected activities under
29 section 215(a)(3). See, e.g., *Chennisi v. Communications Constr. Group*, 2005 WL 387594,
30 at *2 (E.D.Pa. Feb.17, 2005); *Coyle v. Madden*, No. 03-4433, 2003 WL 22999222 (E.D.Pa.
31 Dec.17, 2003). In concluding that an internal complaint to an employer regarding a violation
32 of the FLSA is a protected activity under § 215(a)(3), one court in the Eastern District
33 reasoned that in order to achieve the "remedial and humanitarian" purpose of the FLSA, it
34 is necessary to make an internal complaint a protected activity. *Chennisi*, 2005 WL 387594,
35 at *2 . Under a narrower construction, informal settlement of complaints would be
36 discouraged, as an employee would be required to take legal action in order to preserve her
37 FLSA rights. Accordingly, this Court agrees that the Third Circuit's liberal interpretation of
38 the phrase "filed any complaint" affords employees who make informal complaints
39 protection under section 215(a)(3).

40 Accordingly, the instruction lists informal complaints to the employer as one of the activities
41 protected from retaliation by the employer.

1 *Standard for Actionable Retaliation*

2 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 126 S.Ct. 2405, 2415 (2006), held
3 that a cause of action for retaliation under Title VII lies whenever the employer responds to protected
4 activity in such a way “that a reasonable employee would have found the challenged action
5 materially adverse, which in this context means it well might have dissuaded a reasonable worker
6 from making or supporting a charge of discrimination.” (citations omitted). The Court elaborated on
7 this standard in the following passage:

8 We speak of *material* adversity because we believe it is important to separate
9 significant from trivial harms. Title VII, we have said, does not set forth “a general civility
10 code for the American workplace.” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S.
11 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to report
12 discriminatory behavior cannot immunize that employee from those petty slights or minor
13 annoyances that often take place at work and that all employees experience. See 1 B.
14 Lindemann & P. Grossman, *Employment Discrimination Law* 669 (3d ed. 1996) (noting that
15 “courts have held that personality conflicts at work that generate antipathy” and “snubbing’
16 by supervisors and co-workers” are not actionable under § 704(a)). The anti-retaliation
17 provision seeks to prevent employer interference with “unfettered access” to Title VII's
18 remedial mechanisms. It does so by prohibiting employer actions that are likely “to deter
19 victims of discrimination from complaining to the EEOC,” the courts, and their employers.
20 And normally petty slights, minor annoyances, and simple lack of good manners will not
21 create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.

22 We refer to reactions of a *reasonable* employee because we believe that the
23 provision's standard for judging harm must be objective. An objective standard is judicially
24 administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial
25 effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need
26 for objective standards in other Title VII contexts, and those same concerns animate our
27 decision here. See, e.g., [*Pennsylvania State Police v. Suders*, 542 U.S., at 141, 124 S. Ct.
28 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris v. Forklift Systems, Inc.*,
29 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment
30 doctrine).

31 We phrase the standard in general terms because the significance of any given act
32 of retaliation will often depend upon the particular circumstances. Context matters. . . . A
33 schedule change in an employee's work schedule may make little difference to many workers,
34 but may matter enormously to a young mother with school age children. A supervisor's
35 refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But
36 to retaliate by excluding an employee from a weekly training lunch that contributes
37 significantly to the employee's professional advancement might well deter a reasonable
38 employee from complaining about discrimination. Hence, a legal standard that speaks in
39 general terms rather than specific prohibited acts is preferable, for an act that would be
40 immaterial in some situations is material in others.

1 Finally, we note that . . . the standard is tied to the challenged retaliatory act, not the
2 underlying conduct that forms the basis of the Title VII complaint. By focusing on the
3 materiality of the challenged action and the perspective of a reasonable person in the
4 plaintiff's position, we believe this standard will screen out trivial conduct while effectively
5 capturing those acts that are likely to dissuade employees from complaining or assisting in
6 complaints about discrimination.

7 126 S.Ct. at 2415 (some citations omitted).

8 The anti-retaliation provision of Title VII, construed by the Court in *White*, is substantively
9 identical to the Equal Pay Act provision on retaliation, *supra*. This instruction therefore follows the
10 guidelines of the Supreme Court's decision in *White*.⁴

11 *No Requirement That Retaliation Be Job-Related To Be Actionable*

12 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 126 S.Ct. 2405, 2413 (2006), held
13 that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court
14 rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse
15 employment action in order to recover for retaliation. The Court distinguished Title VII's retaliation
16 provision from its basic anti-discrimination provision, which does require an adverse employment
17 action. The Court noted that unlike the basic anti-discrimination provision, which refers to
18 conditions of employment, the anti-retaliation provision is broadly worded to prohibit *any*
19 discrimination by an employer in response to protected activity.

20 Because the Equal Pay Act anti-retaliation provision is substantively identical to the Title
21 VII provision construed in *White* — it prohibits not only “discharge” but broadly prohibits “any other
22 discrimination” — this instruction contains bracketed material to cover a plaintiff's claim for
23 retaliation that is not job-related. The instruction does not follow pre-*White* Third Circuit authority
24 which required the plaintiff in a retaliation claim to prove that she suffered an adverse employment
25 action. *See, e.g., Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir.1995)(requiring the plaintiff
26 in a retaliation case to prove among other things that “the employer took an adverse employment
27 action against her”). For further discussion of *White*, see the Comment to Instruction 5.1.7.

28 *Damages*

29 It is important to note that the damages available for retaliation differ from the damages
30 available for a violation of the Equal Pay Act itself. Under the Equal Pay Act, the plaintiff is entitled

⁴ The Committee has not attempted to determine whether *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011) — in which the Supreme Court recognized a right of action under Title VII for certain third parties who engaged in no protected activity but were subjected to reprisals based on the protected activities of another employee — provides authority for recognition of similar third-party retaliation claims under the Equal Pay Act. For a discussion of *Thompson*, see Comment 5.1.7.

1 to the pay that she should have received for equal work, with that figure doubled as liquidated
2 damages. See Instructions 11.3.1-11.3.2. A cause of action for retaliation does not seek equal pay
3 recovery per se; indeed a person may engage in protected activity by complaining about wage
4 discrimination even if that person is not the victim of the wage discrimination. The damages asserted
5 in a retaliation claim are those suffered by the plaintiff from the retaliatory act. Thus, the damages
6 in a retaliation cause of action are the same as those provided in any other action for damages, e.g.,
7 pain and suffering, lost wages, etc. See Instruction 11.3.7.

8 *Determinative Effect*

9 Instruction 11.1.2 requires the plaintiff to show that the plaintiff's protected activity had a
10 "determinative effect" on the allegedly retaliatory activity. This language is similar to that provided
11 in Instruction 5.1.7 for Title VII retaliation claims. In the context of Title VII retaliation claims,
12 courts have in the past recognized a distinction between pretext and mixed-motive cases. For Title
13 VII retaliation claims that proceed on a "pretext" theory, the "determinative effect" standard applies.
14 See *Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 (3d Cir. 1997) (holding that it was error, in a
15 case that proceeded on a "pretext" theory, not to use the "determinative effect" language). Comment
16 5.1.7 discusses the possibility of applying a mixed-motive framework to Title VII retaliation claims.

17 The court of appeals has not applied a mixed-motive framework to Equal Pay Act retaliation
18 claims, and it is unclear whether such a framework can appropriately apply to such claims. In the
19 context of another statutory scheme the Supreme Court has criticized the use of a "mixed motive"
20 framework for employment discrimination cases. In *Gross v. FBL Financial Services, Inc.*, 129 S.
21 Ct. 2343 (2009), the Supreme Court rejected the use of a mixed-motive framework for claims under
22 the Age Discrimination in Employment Act (ADEA). The *Gross* Court reasoned that it had never
23 held that the mixed-motive framework set by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989),
24 applied to ADEA claims; that the ADEA's reference to discrimination "because of" age indicated
25 that but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that
26 when Congress in 1991 provided the statutory mixed-motive framework codified at Section
27 2000e-5(g)(2)(B), that provision was not drafted so as to cover ADEA claims.

11.2.1 Equal Pay Act Defenses — Seniority System

Model

If you find that [plaintiff] has proved each of the elements that she must establish in support of her claim under the Equal Pay Act, you must then consider [defendant's] defense. [Defendant] contends that the difference in pay between the two jobs was the result of a bona fide seniority system. In order to establish that a seniority system exists, [defendant] must show that it uses a system that gives employees rights and benefits that improve the longer they work for [defendant].

In determining whether [defendant] has demonstrated a bona fide seniority system, you should consider that a valid seniority system ordinarily includes rules that

1. define when the seniority time clock begins ticking;
2. specify how and when a particular person's seniority may be lost;
3. define which time will count toward the accrual of seniority and which will not;
4. specify the types of employment conditions that will be governed by seniority and those that will not.

For [defendant] to successfully demonstrate a bona fide seniority system, [defendant] must regularly consider seniority rather than doing so randomly or on a case-by-case basis, and [defendant] must apply its system uniformly in its decisions.

[[Plaintiff] contends that [defendant's] seniority system was not bona fide, but rather was a pretext, or excuse, for paying higher wages to men for equal work. Remember that [plaintiff] does not have to prove that [defendant] intended to discriminate. However, evidence of intent to discriminate may be considered in determining whether [defendant's] seniority system was implemented in good faith or instead was a cover-up for paying higher wages to men for equal work.].

If you find [defendant] has proved by a preponderance of the evidence that the difference in pay was the result of a bona fide seniority system, your verdict must be for [defendant]. If [defendant] has not proved this defense, then you must find for [plaintiff].

Comment

Wage differentials based on a bona fide seniority system do not violate the Equal Pay Act. 29 U.S.C.A. § 206(d)(1). *See, e.g., Strag v. Board of Trustees*, 55 F.3d 943, 948 (4th Cir.1995); *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir.1995). In order to be relied on as an affirmative defense, the seniority system must be applied fairly among all employees unless there are defined exceptions that

1 are known and understood by the employees. *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir.1995) (if
2 seniority system is to be relied upon as affirmative defense, employer must be able to identify
3 standards for measuring seniority that are systematically applied and observed).

4 The instruction provides for the possibility that the plaintiff will introduce evidence that the
5 defendant's affirmative defense is a pretext for sex discrimination. In *EEOC v. State of Delaware*
6 *Dept. of Health and Social Services*, 865 F.2d 1408, 1414, n.8 (3d Cir. 1989), the court stated that
7 to prevail on an Equal Pay Act claim, "a plaintiff need not prove that the employer intended to
8 discriminate. Such a showing, however, may be used to establish that an employer's reliance on an
9 affirmative defense is merely a pretext for discrimination." The court favorably cited the opinion in
10 *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986), which stated that "the appropriate
11 inquiry to determine if the factor put forward is a pretext, is whether the employer has used the factor
12 reasonably in light of the employer's stated purpose as well as its other practices."

13 Under the Equal Pay Act, the defendant at all times retains the burden of proving a legitimate
14 reason for the discrepancy in pay. See *Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000)
15 ("Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206
16 et seq., do not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather, they
17 follow a two-step burden-shifting paradigm."); *Henderson v. Chartiers Valley School*, 136 Fed.
18 Appx. 456, 459 (3d Cir. 2005) (approving an instruction that the defendant "must prove that a factor
19 other than sex caused them to set the salaries that they did" and giving no indication that the plaintiff
20 has the burden of proving pretext by a preponderance of the evidence).⁵ Accordingly, the instruction
21 does not impose a burden on the plaintiff of proving pretext by a preponderance of the evidence.

⁵At least one district court opinion has stated that where the employer demonstrates that there is a legitimate reason for the discrepancy in pay, "the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the reason for the disparity presented by defendant is only a pretext." *Welde v. Tetley*, 864 F. Supp. 440 (M.D. Pa. 1994). But there is nothing in the Equal Pay Act to justify shifting the burden of disproving the affirmative defense to the plaintiff.

11.2.2 Equal Pay Act Defenses — Merit System

Model

If you find that [plaintiff] has proved each of the elements that she must establish in support of her claim under the Equal Pay Act, you must then consider [defendant's] defense. [Defendant] contends that the difference in pay between the two jobs was the result of a bona fide merit system.

In order to establish the existence of a bona fide merit system, [defendant] must show an organized and structured procedure under which employees are systematically evaluated according to established standards that are designed to determine the relative merits of the employees. To be a bona fide merit system, the system must reward persons because they performed better; the reward must not be based upon their positions, but upon their personal performance. In order to be valid, [defendant] must inform its employees of the existence of the merit system, either by writing or in some other way, and it must not be based upon gender.

[[Plaintiff] contends that [defendant's] merit system was not bona fide, but rather was a pretext, or excuse, for paying higher wages to men for equal work. Remember that [plaintiff] does not have to prove that [defendant] intended to discriminate. However, evidence of intent to discriminate may be considered in determining whether [defendant's] merit system was implemented in good faith or instead was a cover-up for paying higher wages to men for equal work.].

If you find [defendant] has proved by a preponderance of the evidence that the difference in pay was the result of a bona fide merit system, your verdict must be for [defendant]. If [defendant] has not proved this defense, then you must find for [plaintiff].

Comment

A merit system is an affirmative defense under the Equal Pay Act. 29 U.S.C.A. § 206(d)(2). A merit system is an organized, structured procedure under which employees are evaluated systematically according to predetermined criteria. *Ryduchowski v. Port Authority*, 203 F.3d 135, 142-43 (2d Cir. 2000). An employer must show that its merit system is administered, if not formally, at least systematically and objectively. *Maxwell v. City of Tucson*, 803 F.2d 444, 447 (9th Cir.1986). The mere existence of a written set of job descriptions, regularly evaluated, does not constitute a “merit system” where there is no organized means of advancement or reward for merit. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 345-46 (7th Cir.1988).

The existence of the merit system must be communicated to the affected employees. *Ryduchowski v. Port Authority*, 203 F.3d 135, 143 (2d Cir. 2000) (employees must be aware of merit system and merit system must not be gender-based); *EEOC v. Whitin Machine Works*, 635 F.2d 1095, 1098 n.6 (4th Cir.1980) (defendant’s burden of establishing a merit system was not met where defendant maintained no written guidelines and had “failed to communicate the essential

1 components of the putative sex neutral pay system to its employees”).

2 The instruction provides for the possibility that the plaintiff will introduce evidence that the
3 defendant’s affirmative defense is a pretext for sex discrimination. In *EEOC v. State of Delaware*
4 *Dept. of Health and Social Services*, 865 F.2d 1408, 1414, n.8 (3d Cir. 1989), the court stated that
5 to prevail on an Equal Pay Act claim, “a plaintiff need not prove that the employer intended to
6 discriminate. Such a showing, however, may be used to establish that an employer’s reliance on an
7 affirmative defense is merely a pretext for discrimination.” The court favorably cited the opinion in
8 *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986), which stated that “the appropriate
9 inquiry to determine if the factor put forward is a pretext, is whether the employer has used the factor
10 reasonably in light of the employer's stated purpose as well as its other practices.”

11 Under the Equal Pay Act, the defendant at all times retains the burden of proving a legitimate
12 reason for the discrepancy in pay. *See Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000)
13 (“Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206
14 et seq., do not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather, they
15 follow a two-step burden-shifting paradigm.”); *Henderson v. Chartiers Valley School*, 136 Fed.
16 Appx. 456, 459 (3d Cir. 2005) (approving an instruction that the defendant “must prove that a factor
17 other than sex caused them to set the salaries that they did” and giving no indication that the plaintiff
18 has the burden of proving pretext by a preponderance of the evidence).⁶ Accordingly, the instruction
19 does not impose a burden on the plaintiff of proving pretext by a preponderance of the evidence.

⁶At least one district court opinion has stated that where the employer demonstrates that there is a legitimate reason for the discrepancy in pay, “the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the reason for the disparity presented by defendant is only a pretext.” *Welde v. Tetley*, 864 F. Supp. 440 (M.D. Pa. 1994). But there is nothing in the Equal Pay Act to justify shifting the burden of disproving the affirmative defense to the defendant.

11.2.3 Equal Pay Act Defenses — System Measuring Earnings By Quantity or Quality

Model

If you find that [plaintiff] has proved each of the elements that she must establish in support of her claim under the Equal Pay Act, you must then consider [defendant's] defense. [Defendant] contends that the difference in pay between the two jobs was the result of a bona fide system that measures employee earnings by quantity or quality of the work.

In order to prove the existence of a bona fide system measuring quantity or quality, [defendant] must show that such a system is in place and has been applied regularly and consistently. A valid system under this exception measures the employee's earnings by the quantity or quality of each employee's production.

The quantity test refers to equal dollar per unit compensation rates. [Defendant] is not liable for wage discrimination if it has implemented a system under which two employees receive the same pay rate but one receives more total compensation because that employee produces more.

The quality test refers to increased compensation for higher quality products. [Defendant] is not liable for wage discrimination if it regularly rewards employees of both sexes equally for producing higher quality products through compensation incentives.

[[Plaintiff] contends that [defendant's] system of measuring quantity or quality was not bona fide, but rather was a pretext, or excuse, for paying higher wages to men for equal work. Remember that [plaintiff] does not have to prove that [defendant] intended to discriminate. However, evidence of intent to discriminate may be considered in determining whether [defendant's] system was implemented in good faith or instead was a cover-up for paying higher wages to men for equal work.].

If you find [defendant] has proved by a preponderance of the evidence that the difference in pay was the result of a bona fide system tying wages to quantity or quality, your verdict must be for [defendant]. If [defendant] has not proved this defense, then you must find for [plaintiff].

Comment

The Equal Pay Act provides an affirmative defense if the employer has a system under which a comparable employee receives more total compensation because he produces more value for the employer. 29 U.S.C.A. § 206(d)(3). Thus, in *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3d Cir. 1973), the court held that an affirmative defense for unequal pay had been established where one clothing department in a store was more profitable than another.

1 The instruction provides for the possibility that the plaintiff will introduce evidence that the
2 defendant’s affirmative defense is a pretext for sex discrimination. In *EEOC v. State of Delaware*
3 *Dept. of Health and Social Services*, 865 F.2d 1408, 1414, n.8 (3d Cir. 1989), the court stated that
4 to prevail on an Equal Pay Act claim, “a plaintiff need not prove that the employer intended to
5 discriminate. Such a showing, however, may be used to establish that an employer’s reliance on an
6 affirmative defense is merely a pretext for discrimination.” The court favorably cited the opinion in
7 *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986), which stated that “the appropriate
8 inquiry to determine if the factor put forward is a pretext, is whether the employer has used the factor
9 reasonably in light of the employer’s stated purpose as well as its other practices.”

10 Under the Equal Pay Act, the defendant at all times retains the burden of proving a legitimate
11 reason for the discrepancy in pay. *See Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000)
12 (“Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206
13 et seq., do not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather, they
14 follow a two-step burden-shifting paradigm.”); *Henderson v. Chartiers Valley School*, 136 Fed.
15 Appx. 456, 459 (3d Cir. 2005) (approving an instruction that the defendant “must prove that a factor
16 other than sex caused them to set the salaries that they did” and giving no indication that the plaintiff
17 has the burden of proving pretext by a preponderance of the evidence).⁷ Accordingly, the instruction
18 does not impose a burden on the plaintiff of proving pretext by a preponderance of the evidence.

⁷At least one district court opinion has stated that where the employer demonstrates that there is a legitimate reason for the discrepancy in pay, “the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the reason for the disparity presented by defendant is only a pretext.” *Welde v. Tetley*, 864 F. Supp. 440 (M.D. Pa. 1994). But there is nothing in the Equal Pay Act to justify shifting the burden of disproving the affirmative defense to the defendant.

11.2.4 Equal Pay Act Defenses — Factor Other Than Sex

Model

If you find that [plaintiff] has proved each of the elements that she must establish in support of her claim under the Equal Pay Act, you must then consider [defendant's] defense. [Defendant] contends that the difference in pay between the two jobs was the result of a factor other than sex. Specifically, [defendant] claims that the difference in pay is attributable to [employee's education] [employee's experience] [training programs in which employees participate] [any other factor other than sex on which defendant has presented sufficient evidence to raise a jury question]. To establish that this defense, [defendant] must prove that [plaintiff's] sex played no part in the difference in wages.

[[Plaintiff] contends that [defendant's] explanation for the difference in pay is only a pretext, or excuse, for paying higher wages to men for equal work. Remember that [plaintiff] does not have to prove that [defendant] intended to discriminate. However, evidence of intent to discriminate may be considered in determining whether [defendant's] explanation is valid or instead is a cover-up for paying higher wages to men for equal work.].

If you find [defendant] has proved by a preponderance of the evidence that the difference in pay was the result of [describe defendant's explanation], your verdict must be for [defendant]. However, if you determine that [defendant] has failed to prove that the difference in pay was caused by this factor other than sex, you must decide in favor of [plaintiff].

Comment

29 U.S.C.A. § 206(d) provides for a catch-all affirmative defense: plaintiff is not entitled to recovery of equal pay if the defendant can prove that the disparity in pay was due to a factor other than sex. The Third Circuit has held that in order for the defendant to meet its burden, it must show “that the proffered reasons actually motivated the wage disparity.” *Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000).

A “factor other than sex” can be found when the pay disparity “results from unique characteristics of the same job; from an individual’s experience, training, or ability; or from special exigent circumstances connected with the business.” *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988). An employer does not establish an affirmative defense by claiming that “market forces” justify a disparity in pay for equal work, i.e., that men had to be paid higher because otherwise they would not have taken the job. *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974); *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 910 (3d Cir. 1991).

1 *Education*

2 Differences in education may justify differences in wages, but only where the education is
3 relevant to successful performance of the job. See 29 C.F.R. § 1620.15 (“Possession of a skill not
4 needed to meet requirements of the job cannot be considered in making a determination regarding
5 equality of skill.”). See, e.g., *Glunt v. GES Exposition Services, Inc.*, 123 F. Supp.2d 847, 860-61
6 (D.Md. 2000) (additional formal education is a bona fide reason under the Equal Pay Act for paying
7 different wages; however, the defense is applicable only when superior formal education is actually
8 relevant and necessary to the job in question); *Bullock v. Pizza Hut, Inc.*, 429 F. Supp. 424, 430
9 (M.D.La.1977) (fact that one male manager had three years of college did not justify disparity
10 between his salary and female plaintiffs with better performance records absent showing that a
11 college education was a prerequisite to employment as manager or that employer derived any great
12 benefit from manager having such qualifications).

13 *Experience:*

14 Less experience can be a legitimate factor other than sex for lower pay. See, e.g., *EEOC v.*
15 *New York Times Broadcasting Service, Inc.*, 542 F.2d 356, 359-60 (6th Cir.1976) (evidence that
16 starting salaries paid to new employees bore direct relationship to prior broadcast experience was
17 sufficient to show that discrepancy in pay was not based on considerations of sex); *Stanley v.*
18 *University of Southern California*, 178 F.3d 1069, 1075 (9th Cir.1999) (male coach had coached
19 Olympic team, written book on basketball, and had 14 years more experience than the plaintiff, the
20 coach of the women’s basketball team).

21 *Training Program:*

22 Wage differentials arising because one worker is participating in a bona fide training program
23 have been found to be based on a factor other than sex. See, e.g., *Shultz v. First Victoria Nat'l Bank*,
24 420 F.2d 648, 654 (5th Cir.1969). A training program must have substance and significance
25 independent of the trainee's regular job. *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1047 (5th Cir.
26 1973) (training program coterminous with “man's work” cannot qualify as a factor other than sex).

27 *Pretext:*

28 The instruction provides for the possibility that the plaintiff will introduce evidence that the
29 defendant’s affirmative defense is a pretext for sex discrimination. In *EEOC v. State of Delaware*
30 *Dept. of Health and Social Services*, 865 F.2d 1408, 1414, n.8 (3d Cir. 1989), the court stated that
31 to prevail on an Equal Pay Act claim, “a plaintiff need not prove that the employer intended to
32 discriminate. Such a showing, however, may be used to establish that an employer’s reliance on an
33 affirmative defense is merely a pretext for discrimination.” The court favorably cited the opinion in
34 *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986), which stated that “the appropriate
35 inquiry to determine if the factor put forward is a pretext, is whether the employer has used the factor
36 reasonably in light of the employer's stated purpose as well as its other practices.”

37 Under the Equal Pay Act, the defendant at all times retains the burden of proving a legitimate

1 reason for the discrepancy in pay. *See Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000)
2 (“Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206
3 et seq., do not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather, they
4 follow a two-step burden-shifting paradigm.”); *Henderson v. Chartiers Valley School*, 136 Fed.
5 Appx. 456, 459 (3d Cir. 2005) (approving an instruction that the defendant “must prove that a factor
6 other than sex caused them to set the salaries that they did” and giving no indication that the plaintiff
7 has the burden of proving pretext by a preponderance of the evidence).⁸ Accordingly, the instruction
8 does not impose a burden on the plaintiff of proving pretext by a preponderance of the evidence.

⁸At least one district court opinion has stated that where the employer demonstrates that there is a legitimate reason for the discrepancy in pay, “the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the reason for the disparity presented by defendant is only a pretext.” *Welde v. Tetley*, 864 F. Supp. 440 (M.D. Pa. 1994). But there is nothing in the Equal Pay Act to justify shifting the burden of disproving the affirmative defense to the defendant.

11.3.1 Equal Pay Act Damages — General Compensatory Damages

No Instruction

Comment

29 U.S.C. § 216(b) provides that recovery for an Equal Pay Act violation consists of the amount of underpayment and “an additional equal amount as liquidated damages.” There is no statutory authority for an award of damages such as for emotional distress, pain and suffering, or lost opportunity. Accordingly, no instruction is provided.

It should be noted, however, that general compensatory damages are available if the cause of action is for retaliation rather than unequal pay. A damages instruction for retaliation is provided *infra*. See Instruction 11.3.7.

11.3.2 Equal Pay Act Damages — Back Pay — Non-Willful Violations

Model

If you find that [plaintiff] has proved by a preponderance of the evidence that she was paid less than [name(s) of male employee(s)] for performing substantially equal work, [and if you find that [defendant] has failed to show that the wage differential was based on a permissible factor on which I previously instructed you] then you must award damages to [plaintiff]. [Plaintiff] has the burden of proving the amount of those damages by a preponderance of the evidence.

[Instruct as follows if the plaintiff's pay is compared to a single male employee:]

You must award [plaintiff] the amount of damages that compensates her for the difference between what she was paid (in both wages and benefits) and what [name of male employee] was paid (in both wages and benefits) during the period starting [two years before the date the lawsuit was filed] through the date of your verdict.]

[Instruct as follows if the plaintiff's pay is compared to more than one male employee:]

You must award [plaintiff] the amount of damages that compensates her for the difference between what she was paid (in both wages and benefits) and the average amount of what [names or job titles of male employees] were paid (in both wages and benefits) during the period starting [two years before the date the lawsuit was filed] through the date of your verdict.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Comment

The Equal Pay Act provides recovery for two years of wage differential if the defendant's violation was non-willful; it extends the recovery of damages to a third year if the defendant's violation is willful. 29 U.S.C. § 255(a). This instruction is to be used when the plaintiff does not present evidence sufficient to create a jury question on whether the defendant acted willfully. See 11.3.3 for an instruction covering a willful violation of the Equal Pay Act.

1 Where the plaintiff compares her salary to more than one male employee, most courts have
2 held that the proper amount of damages is the difference between the plaintiff's pay and the average
3 amount of pay earned by the male comparables as a group. *See, e.g., Melanson v. Rantoul*, 536 F.
4 Supp. 271 (D.R.I. 1982); *Bullock v. Pizza Hut, Inc.*, 429 F. Supp. 424, 431 (M.D. La. 1977) (stating
5 that applying averages "best serves the interest of justice"). At least one court, however, has held
6 that damages should be assessed by comparing the plaintiff's wages "to the highest male salary being
7 paid for the job at the time of performance." *Grimes v. Athens Newspaper, Inc.*, 604 F. Supp. 1166,
8 1168 (M.D.Ga. 1985). There appears to be no Third Circuit case law on this point.

9 *Attorney Fees and Costs*

10 There appears to be no uniform practice regarding the use of an instruction that warns the
11 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652
12 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff
13 wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you
14 award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how
15 much. Therefore, attorney fees and costs should play no part in your calculation of any damages."
16 *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the
17 instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether
18 a district court commits error by informing a jury about the availability of attorney fees in an ADEA
19 case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657.
20 First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees"
21 is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might,
22 absent information that the Court has discretion to award attorney fees at a later stage, seek to
23 compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that
24 the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the
25 disproportionate step of returning a verdict against him even though it believed he was the victim
26 of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*;
27 *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and
28 *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991)).

11.3.3 Equal Pay Act Damages — Back Pay — Willful Violations

Model

If you find that [plaintiff] has proved by a preponderance of the evidence that she was paid less than [name(s) of male employee(s)] for performing substantially equal work, [and if you find that [defendant] has failed to show that the wage differential was based on a permissible factor on which I previously instructed you] then you must award damages to [plaintiff]. [Plaintiff] has the burden of proving the amount of those damages by a preponderance of the evidence.

In this case, [plaintiff] alleges that [defendant] willfully violated the Equal Pay Act. If [plaintiff] proves to you by a preponderance of the evidence that [defendant's] violation of the Equal Pay Act was willful, then this will have an effect on the damages that you must award. I will explain this effect in a minute, but first I will provide you more information on what it means to be a "willful" violation.

You must find [defendant's] violation of the Equal Pay Act to be willful if [plaintiff] proves by a preponderance of the evidence that [defendant] knew or showed reckless disregard for whether [plaintiff's] underpayment was prohibited by the law. To establish willfulness it is not enough to show that [defendant] acted negligently. If you find that [defendant] did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard for whether its conduct was prohibited by the law, then [defendant's] conduct was not willful.

[Instruct as follows if the plaintiff's pay is compared to a single male employee:]

If you find that [defendant's] violation was willful, then you must award [plaintiff] the amount of damages that compensates her for the difference between what she was paid (in both wages and benefits) and what [name of male employee] was paid (in both wages and benefits) during the period starting [three years before the date the lawsuit was filed] through the date of your verdict. However, if you find that [defendant's] violation of the Equal Pay Act was not willful, then you must award [plaintiff] the difference between what she was paid (in both wages and benefits) and what [name of male employee] was paid (in both wages and benefits) during the period starting [two years before the date the lawsuit was filed] through the date of your verdict. In other words, [plaintiff] is entitled to damages for an extra year if she proves that [defendant's] violation was willful.]

[Instruct as follows if the plaintiff's pay is compared to more than one male employee:]

If you find that [defendant's] violation was willful, then you must award [plaintiff] the amount of damages that compensates her for the difference between what she was paid (in both

wages and benefits) and the average amount of what [names or job titles of male employees] were paid (in both wages and benefits) during the period starting [three years before the date the lawsuit was filed] through the date of your verdict. However, if you find that [defendant's] violation of the Equal Pay Act was not willful, then you must award [plaintiff] the difference between what she was paid (in both wages and benefits) and the average amount of what [names or job titles of male employees] were paid (in both wages and benefits) during the period starting [two years before the date the lawsuit was filed] through the date of your verdict. In other words, [plaintiff] is entitled to damages for an extra year if she proves that [defendant's] violation was willful.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Comment

The Equal Pay Act provides recovery for two years of wage differential if the defendant's violation was non-willful; it extends the recovery of damages to a third year if the defendant's violation was willful. 29 U.S.C. § 255(a). This instruction is to be used when the plaintiff presents evidence sufficient to create a jury question on whether the defendant acted willfully. See Instruction 11.3.2 for the instruction to be used when there is insufficient evidence to create a jury question on willfulness.

In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), the Court held that the standard for "willfulness" under the Equal Pay Act is the same as the standard for "willfulness" required for an award of liquidated damages under the ADEA. That standard is met if the employer "either knew or showed reckless disregard" for the matter of whether its conduct violated the law. This instruction accordingly uses that definition of "willfulness." See *EEOC v. State of Delaware Dept. of Health and Social Services*, 865 F.2d 1408, 1419 (3d Cir. 1989) (affirming a jury verdict on willfulness, and an award for a third year of damages, where the jury could have found that a personnel director "must have entertained a strong suspicion of an Equal Pay Act violation which, with the most cursory investigation, would have led to actual knowledge."). See also *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (adopting the standard of "either knew or showed reckless disregard" for determination of "willfulness" under the liquidated damages provision of the ADEA).

Where the plaintiff compares her salary to more than one male employee, most courts have held that the proper amount of damages is the difference between the plaintiff's salary and the average amount of salary earned by the male comparables as a group. See *Melanson v. Rantoul*, 536 F. Supp. 271 (D.R.I. 1982); *Bullock v. Pizza Hut, Inc.*, 429 F. Supp. 424, 431 (M.D. La. 1977) (stating that applying averages "best serves the interest of justice"). At least one court, however, has

1 held that damages should be assessed by comparing the plaintiff's wages "to the highest male salary
2 being paid for the job at the time of performance." *Grimes v. Athens Newspaper, Inc.*, 604 F. Supp.
3 1166, 1168 (M.D.Ga. 1985). There appears to be no Third Circuit case law on this point.

4 *Attorney Fees and Costs*

5 There appears to be no uniform practice regarding the use of an instruction that warns the
6 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652
7 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff
8 wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you
9 award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how
10 much. Therefore, attorney fees and costs should play no part in your calculation of any damages."
11 *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the
12 instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether
13 a district court commits error by informing a jury about the availability of attorney fees in an ADEA
14 case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657.
15 First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees"
16 is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might,
17 absent information that the Court has discretion to award attorney fees at a later stage, seek to
18 compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that
19 the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the
20 disproportionate step of returning a verdict against him even though it believed he was the victim
21 of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*;
22 *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and
23 *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991)).

11.3.4 Equal Pay Act Damages — Liquidated Damages

No Instruction

Comment

29 U.S.C. § 216 provides for an automatic doubling of back pay damages awarded for a violation of the Equal Pay Act. No instruction is necessary on liquidated damages, because there is no issue for the jury to decide concerning the availability or amount of liquidated damages. The court simply doubles the award of back pay damages found by the jury.

It should be noted that 29 U.S.C. § 260 provides that “if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [Equal Pay Act], the court may, in its sound discretion” reduce the award of liquidated damages (but not the underlying damages award). No instruction is necessary on good faith, either, because the question of good faith in this circumstance is a question for “the court.” The jury has no authority to reduce an award of liquidated damages under the Equal Pay Act. *See, e.g., Glenn v. General Motors Corp.*, 841 F.2d 1567, 1573 (11th Cir. 1988) (“An employer may avoid the mandatory nature of an award of liquidated damages if the court chooses not to make an award where the employer shows its actions were in good faith and shows it has reasonable grounds for believing that those actions did not violate the Equal Pay Act.”); *Reich v. Tiller Helicopter Services, Inc.*, 8 F.3d 1018, 1031 (5th Cir.1993) (question of “good faith under 29 U.S.C.A. § 260 is an issue that the court must resolve”).

11.3.5 Equal Pay Act Damages — Front Pay

No Instruction

Comment

Front pay is a substitute remedy when reinstatement is not feasible. See the commentary to Instruction 8.4.4. An Equal Pay Act claim does not involve the plaintiff's discharge. Accordingly, front pay cannot be awarded under the Equal Pay Act. See 29 U.S.C. § 216(b), which provides that recovery for an Equal Pay Act violation consists of the amount of underpayment and "an additional equal amount as liquidated damages" with no mention of front pay.

11.3.6 Equal Pay Act Damages — Nominal Damages

No Instruction

Comment

The gravamen of an Equal Pay Act claim (as distinct from a retaliation claim under the Equal Pay Act) is that the plaintiff was paid less than male employees for equal work. Therefore it would seem impossible for a jury to find that the defendant violated the plaintiff's rights under the Equal Pay Act and yet the plaintiff is entitled only to nominal damages. Accordingly, no instruction is included.

11.3.7 Equal Pay Act Damages — Damages for Retaliation

Model

If you find that [plaintiff] has proved by a preponderance of the evidence that she suffered an adverse employment action as a result of [describe protected activity] then you must determine the amount of damages suffered by [plaintiff] as a result of [defendant's] retaliation. Damages for retaliation are distinct from any damages [plaintiff] may be entitled to for having been paid a lower wage than male employees for equal work. [Plaintiff] has the burden of proving damages from the retaliation by a preponderance of the evidence.

The following are the kinds of damages that the law may allow a plaintiff to recover when an employer retaliates against the plaintiff for engaging in protected activity under the Equal Pay Act:

1. Compensatory damages.

2. Nominal damages.

3. Punitive damages.

Not all of these damages are necessarily available in any single action. Remember that [plaintiff] has the burden of proving by a preponderance of the evidence that she is entitled to any of the damages that the law makes potentially available to her for an act of retaliation.

I will now instruct you on each of the kinds of damages that are potentially recoverable by [plaintiff] for an act of retaliation.

Compensatory damages:

If you find [defendant] liable for retaliation, then you must consider the issue of compensatory damages. You must award [plaintiff] an amount that will fairly compensate her for any injury she actually sustained as a result of [defendant's] conduct. The damages that you award must be fair compensation, no more and no less. The award of compensatory damages is meant to put [plaintiff] in the position [he/she] would have occupied if the retaliation had not occurred.

[Plaintiff] must show that the damage she claimed would not have occurred without [defendant's] retaliation. [Plaintiff] must also show that [defendant's] act of retaliation played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of [defendant's] act of retaliation. [There can be more than one cause of an injury. To find that [defendant's] retaliation caused [plaintiff's] injury, you need not find

1 that [defendant's] act was the nearest cause, either in time or space. However, if [plaintiff's] claimed
2 injury was caused by a later, independent event that intervened between [defendant's] act of
3 retaliation and [plaintiff's] injury, [defendant] is not liable unless the injury was reasonably
4 foreseeable by [defendant].]

5 Compensatory damages must not be based on speculation or sympathy. They must be based
6 on the evidence presented at trial, and only on that evidence.

7 [Plaintiff] claims the following items of damages *[include any of the following that are*
8 *warranted by the evidence]*:

9 • Physical harm to [plaintiff] during and after the events at issue, including ill health,
10 physical pain, disability, or discomfort, and any such physical harm that [plaintiff] is
11 reasonably certain to experience in the future. In assessing such harm, you should consider
12 the nature and extent of the injury and whether the injury is temporary or permanent.

13 • Emotional and mental harm to [plaintiff] during and after the events at issue, including
14 humiliation, and mental anguish, and any such emotional and mental harm that [plaintiff] is
15 reasonably certain to experience in the future.

16 • The reasonable value of the medical [psychological, hospital, nursing, and similar] care
17 and supplies that [plaintiff] reasonably needed and actually obtained, and the reasonable
18 value of such care and supplies that [plaintiff] is reasonably certain to need in the future.

19 • The [wages, salary, profits, reasonable value of the working time] that [plaintiff] has lost
20 because of [defendant's] retaliation, and the [wages, etc.] that [plaintiff] is reasonably certain
21 to lose in the future because of that retaliation.⁹

22
23 As I instructed you previously, [plaintiff] has the burden of proving damages by a
24 preponderance of the evidence. But the law does not require that [plaintiff] prove the amount of her
25 losses with mathematical precision; it requires only as much definiteness and accuracy as
26 circumstances permit.

27 [You are instructed that [plaintiff] has a duty under the law to "mitigate" her damages--that
28 means that [plaintiff] must take advantage of any reasonable opportunity that may have existed under
29 the circumstances to reduce or minimize the loss or damage caused by [defendant]. So if
30 [defendant] persuades you by a preponderance of the evidence that [plaintiff] failed to take advantage
31 of an opportunity that was reasonably available to her, then you must reduce the amount of
32 [plaintiff's] damages by the amount that could have been reasonably obtained if she had taken

⁹ If the court orders the plaintiff's reinstatement, then the instruction on future lost wages should not be given.

1 advantage of such an opportunity.]

2 [In assessing damages, you must not consider attorney fees or the costs of litigating this case.
3 Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore,
4 attorney fees and costs should play no part in your calculation of any damages.]

5
6 ***Nominal Damages:***

7 If you return a verdict for [plaintiff] on her retaliation claim, but [plaintiff] has failed to prove
8 actual injury resulting from the act of retaliation and therefore is not entitled to compensatory
9 damages, then you must award nominal damages of \$ 1.00.

10 A person whose federal rights were violated is entitled to a recognition of that violation, even
11 if she suffered no actual injury. Nominal damages (of \$1.00) are designed to acknowledge the
12 deprivation of a federal right, even where no actual injury occurred.

13 However, if you find actual injury, you must award compensatory damages (as I instructed
14 you), rather than nominal damages.

15
16 ***Punitive Damages:***

17 [Plaintiff] claims that [defendant's] act of retaliation was done with malice or reckless
18 indifference to [plaintiff's] federally protected rights and that as a result there should be an award of
19 what are called "punitive" damages. A jury may award punitive damages to punish a defendant, or
20 to deter the defendant and others like the defendant from committing such conduct in the future.
21 [Where appropriate, the jury may award punitive damages even if the plaintiff suffered no actual
22 injury, and so received nominal rather than compensatory damages.]

23 An award of punitive damages is permissible in this case only if you find by a preponderance
24 of the evidence that a management official of [defendant] personally acted with malice or reckless
25 indifference in retaliating against [plaintiff] after she [describe protected activity]. An action is with
26 malice if a person knows that it violates the federal law prohibiting retaliation and does it anyway.
27 An action is with reckless indifference if taken with knowledge that it may violate the law.

28
29 **[For use where the defendant raises a jury question on good-faith attempt to comply with the**
30 **law:]**

31 But even if you make a finding that there has been an act of retaliation with malice or
32 reckless disregard of [plaintiff's] federal rights, you cannot award punitive damages if [defendant]

1 proves by a preponderance of the evidence that it made a good-faith attempt to comply with the law,
2 by adopting policies and procedures designed to prevent unlawful retaliation such as that suffered
3 by [plaintiff].]

4 An award of punitive damages is discretionary; that is, if you find that the legal requirements
5 for punitive damages are satisfied [and that [defendant] has not proved that it made a good-faith
6 attempt to comply with the law], then you may decide to award punitive damages, or you may decide
7 not to award them. I will now discuss some considerations that should guide your exercise of this
8 discretion.

9 If you have found the elements permitting punitive damages, as discussed in this instruction,
10 then you should consider the purposes of punitive damages. The purposes of punitive damages are
11 to punish a defendant for a malicious or reckless disregard of federal rights, or to deter a defendant
12 and others like the defendant from doing similar things in the future, or both. Thus, you may
13 consider whether to award punitive damages to punish [defendant]. You should also consider
14 whether actual damages standing alone are sufficient to deter or prevent [defendant] from again
15 performing any wrongful acts it may have performed. Finally, you should consider whether an award
16 of punitive damages in this case is likely to deter others from performing wrongful acts similar to
17 those [defendant] may have committed.

18 If you decide to award punitive damages, then you should also consider the purposes of
19 punitive damages in deciding the amount of punitive damages to award. That is, in deciding the
20 amount of punitive damages, you should consider the degree to which [defendant] should be
21 punished for its wrongful conduct, and the degree to which an award of one sum or another will deter
22 [defendant] or others from committing similar wrongful acts in the future.

23 [The extent to which a particular amount of money will adequately punish a defendant, and
24 the extent to which a particular amount will adequately deter or prevent future misconduct, may
25 depend upon the defendant's financial resources. Therefore, if you find that punitive damages
26 should be awarded against [defendant], you may consider the financial resources of [defendant] in
27 fixing the amount of those damages.]

28 29 **Comment**

30 29 U.S.C. § 216(b) provides for the following recovery for a violation of the anti-retaliation
31 provision of the Equal Pay Act (or the Fair Labor Standards Act):

32 “such legal or equitable relief as may be appropriate to effectuate the purposes of [the anti-
33 retaliation provision] including without limitation employment, reinstatement, promotion,
34 and the payment of wages lost and an additional equal amount as liquidated damages.”

35 The instruction authorizes the jury to award all of the damages generally awarded for an
36 injury at common law. Any other remedies, such as reinstatement or promotion, are equitable

1 remedies left for the court. *See generally Brock v. Richardson*, 812 F.2d 121, 123 (3d Cir. 1987)
2 (stating that the anti-retaliation provision is to be “liberally interpreted” and affirming an award of
3 back pay).

4 In *Marrow v. Allstate Sec. & Investigative Services, Inc.*, 167 F. Supp.2d 838, 841 (E.D.Pa.
5 2001), the court held that punitive damages could be awarded for a violation of the anti-retaliation
6 provision of the Fair Labor Standards Act, 29 U.S.C. § 215, which applies to the Equal Pay Act as
7 well. The court noted that section 216 “authorizes ‘legal’ relief, a term commonly understood to
8 include compensatory and punitive damages.” *See also Travis v. Gary Community Mental Health*
9 *Center*, 921 F.2d 108, 112 (7th Cir. 1990) (“Compensation for emotional distress, and punitive
10 damages, are appropriate for intentional torts such as retaliatory discharge.”).

11 If the jury awards lost wages for retaliation, it is for the court to double the amount as
12 liquidated damages, subject to reduction by the court if the defendant proves that the violation was
13 in good faith. See the Comment to Instruction 11.3.4.

14 *Attorney Fees and Costs*

15 There appears to be no uniform practice regarding the use of an instruction that warns the
16 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652
17 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if plaintiff
18 wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you
19 award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how
20 much. Therefore, attorney fees and costs should play no part in your calculation of any damages.”
21 *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the
22 instruction, and, reviewing for plain error, found none: “We need not and do not decide now whether
23 a district court commits error by informing a jury about the availability of attorney fees in an ADEA
24 case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons.” *Id.* at 657.
25 First, “it is not ‘obvious’ or ‘plain’ that an instruction directing the jury *not* to consider attorney fees”
26 is irrelevant or prejudicial; “it is at least arguable that a jury tasked with computing damages might,
27 absent information that the Court has discretion to award attorney fees at a later stage, seek to
28 compensate a sympathetic plaintiff for the expense of litigation.” *Id.* Second, it is implausible “that
29 the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the
30 disproportionate step of returning a verdict against him even though it believed he was the victim
31 of age discrimination, notwithstanding the District Court’s clear instructions to the contrary.” *Id.*;
32 *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and
33 *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991)).